



BOARD OF INQUIRY (*Human Rights Code*)

SEP - 1 1998

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Maxwell B. Nelson dated July 13, 1989,
alleging discrimination in employment on the basis of race and colour.

B E T W E E N :

Ontario Human Rights Commission

- and -

Maxwell B. Nelson

Complainant

- and -

Durham Board of Education
and
Don Peel

Respondents

DECISION

Adjudicator : Gerry K. McNeilly

Date : August 28, 1998

Board File No: BI-0095-96

Decision No : 98-014

Board of Inquiry (*Human Rights Code*)
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Don Peel, Personal Respondent)))	Patricia Murray, Counsel

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PART I: INTRODUCTION

The Complainant alleges discrimination based on race and colour in contravention of sections 5 and 9 of the *Human Rights Code*, R.S.O., 1990, c.H. 19 (the *Code*) relating to his attempts to be promoted from the position of Vice-Principal to Principal within the Durham Board of Education. The Complainant, who is black, alleges that he was qualified for the position of Principal but never attained it, while white Vice-Principals with less skills, experience and academic qualifications did.

The complaint named two personal Respondents, Chuck Powers and Don Peel, along with Durham Board of Education as a Corporate Respondent. At the outset of the hearing, the complaint against Chuck Powers was withdrawn.

This complaint was filed with the Ontario Human Rights Commission (the Commission) on July 13, 1989 and was referred to the Board of Inquiry (the Board) for hearing on May 23, 1996. There were two preliminary motions brought by the Respondents which were dismissed by way of interim decisions issued by the Board on January 29 and March 25, 1997. This decision deals with the merits of the Complainant's allegation of racial discrimination by his employer, the Durham Board of Education, and its agents and employees.

PART II: THE PARTIES' OPENING STATEMENTS

A. The Commission and the Complainant

The Commission and the Complainant asserted that the Complainant's attempts to get promoted from Vice-Principal of a treatment school to Principal at any school within the Durham Board were unsuccessful because of systemic and direct racial discrimination. The Commission also asserts that the Durham Board had a higher percentage of black teachers in the treatment schools than in its non-treatment schools and that their ability to move laterally into non-treatment schools or to obtain the pre-requisites for promotion to the position of Principal was hindered by Durham Board's practices. Specifically, the Complainant was hindered in his career because of practices or exercises of discretion

related to: permission to take the “principal’s course”; release (non-teaching) time for Vice-Principals; evaluation of requests to transfer out of treatment schools (the entry point for black teachers in the Durham Board) into non-treatment schools; composition of the “short list” from which principals are selected; selection interviews for principalship in which the Complainant’s race was made an issue; criteria (varied experience gained in multiple schools etc.) used for selecting among Vice-Principals for promotions; and, delay in processing of automatic reclassification that benefited the Complainant.

B. The Respondents

The Respondents through their counsel asserted that the primary function of treatment schools is not education, but treatment and care of children. Secondly, given the mandate of treatment schools, their teachers had different experiences from teachers in the non-treatment school system. And thirdly, in the Durham Board’s experience, confirmed in a 1985 report prepared by Jack Gardiner, teachers moving from the small class sizes in treatment schools into large (up to 39 students) class sizes in the non-treatment system had difficulties controlling the classrooms.

In response to the Commission’s and the Complainant’s allegations, the Respondent Durham Board asserted the following:

1. the Complainant “was comfortable in the treatment school system and did not really want to move out of it” and thus did not accept advice from his Principals, specifically, Gardiner and Powers, about how to secure a transfer into the non-treatment school system;
2. release time is based solely on the size of the school, i.e. the number of teachers and students;

3. the Complainant simply did not want to teach but sought 100% release time (i.e. no classroom duties) so that he could not be closely supervised and would be able to operate his financial accounting business on the side; and,
4. there is no automatic time span for promotion from Vice-Principal to Principal and consequently, there were Vice-Principals who served for as long or longer than the Complainant before being promoted.

The Respondent Board conceded that there was “discrimination” but asserted that it was not based on race. Rather, this “discrimination” operated against *all* teachers in the treatment schools who sought to transfer to the non-treatment schools.

PART III: THE EVIDENCE AND FINDINGS OF FACT

The hearing of this matter spanned nineteen days over a period of ten months. A total of twenty witnesses were put forward by the three parties. The evidence below is organized thematically rather than by witness. Certain themes emerged in the evidence and argument and for greater ease, I propose to organize my fact finding on the following factual themes: the Complainant’s educational and work history; the allegations of systemic discrimination in promotion practices (unwritten, informal guidelines and unclear pre-requisites for promotion, non-adherence to pre-requisite as criteria for promotion, denial of opportunities to obtain pre-requisites, concentration of Black teachers in treatment schools and their non-representativeness at the Principal and Vice-Principal levels etc.); and, allegations of racial discrimination directed at the Complainant personally (direct reference to the Complainant’s race during a promotion interview, refusal of management to exercise its discretion reasonably in the Complainant’s favour in granting permission to take the principal’s training course and in processing his re-classification promptly, etc.).

Of the twenty witnesses presented by all three parties, more than half shed very little light on relevant or disputed matters. Very little information on certain witnesses’ backgrounds, their role

in the Durham Board's dealings with the Complainant, or a clear context for their evidence was provided. Nor did it ever become clear what some of their contact with the Complainant was. Few of the witnesses for the Durham Board recalled the practices or events surrounding the complaint with any clarity and documents that might have jogged memories or substantiated disputed facts were not presented at the hearing although the complaint was formally filed in July 1989, shortly after the culminating events that prompted it.

For example, the Respondent's main witness, Mr. Birch, stated that while the Board maintains records on all employees, 99% of the records kept are personnel files and that these records dealt mainly with salary and benefit matters, attendance, teaching certificates, professional credentials, Ministry records and evaluations (appraisals) if any. He said that all documents relating to applications for promotions would have been kept separately, usually by the Superintendent responsible for promotions during a particular year. He further stated that all documents regarding briefing, discussion and interview notes, would be discarded after one year, and that there was no record keeping system in place between the years 1981-1990. As record keeping depended upon the practices of the person in charge at the time, records could not be located, nor is it known if any exists. Accordingly the Durham Board official testified that no record exists of any of the Complainant's earlier applications.

C. The Complainant's Educational Background

In his testimony, the Complainant recounted his educational and professional background. Much of this evidence was also detailed in the complaint. A brief overview follows.

The Complainant was born and educated in Jamaica. In 1963 he obtained a teacher's diploma from Mico Teacher's College followed in 1966 by a Bachelor of Science in Economics at the University of the West Indies. He worked as a teacher in Jamaica, then later worked in private enterprise until 1967 when he emigrated to Canada to further his studies.

He obtained further teaching and non-teaching credentials from the University of Toronto: diploma in Business Administration in 1972; Masters of Education in 1973; Masters in Business Administration in 1975; and Masters in Industrial Relations in 1978. His final non-teaching credential, Certified Management Accountant (C.M.A.), was obtained in 1982 from the Society of Management Accountants of Canada.

His teaching credentials in Canada include teaching certificates for elementary and secondary schools. In 1973, he obtained his Ontario Teaching Certificate. Prior to that date, he relied on a "Certificate of Standard" that he obtained (shortly after his emigration to Canada) from the Ministry of Education (Ontario) on the basis of his training as a teacher in Jamaica. Finally, he completed Part I and Part II of "The Principal's Course" in 1981 and 1982 respectively during the same period that he became a Certified Management Accountant.

D. The Complainant's Employment History at the Durham Board

1. *Progression and Reclassifications*

After his arrival in Canada in 1967, the Complainant worked briefly in the private sector and in September 1969 he obtained a position with Ministry of Health (Ontario) as a classroom teacher at the Grove Treatment Centre School at the Whitby Psychiatric Hospital located on the grounds of the Whitby Psychiatric Hospital. The Complainant taught English and Social Studies at this school which was the largest of about a dozen schools in the Durham area referred to as "treatment schools". The Treatment Schools were renamed Grove Treatment Centre Schools around 1985.

In this decision, non-treatment public schools are sometimes referred to as "regular" schools - a description used by the parties throughout the hearing. "Treatment centres" or "treatment schools" are educational centres to which children are referred, sometimes by court order, to receive counselling in addition to traditional education. Norm Powers, a current Area Superintendent and past Principal of

treatment schools, explained that students in the treatment schools are assessed and classified by grade level to determine an appropriate approach for them to obtain regular course credits. He commented that the word 'treatment' should be in quotations, because while treatment was needed by the students, the teachers focused on providing an education program to enable the students to re-integrate into the "regular" school system.

In 1971, the Complainant was promoted to "Supervising Teacher" at the above-named treatment school and in 1975 he was reclassified as an "Assistant to the Principal". Also in 1975, the Durham Board of Education assumed responsibilities from the Ministry of Education for the Whitby Psychiatric Hospital School and all other treatment schools within its geographic region. Thus, all employees of the Ministry of Health who taught at treatment schools became the employees of Durham Board of Education (Durham Board).

In 1977, the Complainant along with other incumbents with the job title "Assistant to Principal", were automatically reclassified as "Vice-Principal, B" within the Durham Board. There was one Principal and one Vice-Principal for all twelve treatment schools. The Complainant's uncontested evidence was that his duties remained unchanged with this reclassification. Later, in September 1981, the Durham Board awarded an "A" designation to the treatment centre schools as its total staffing complement exceeded eighteen. Accordingly, the Principal and Vice-Principal of the Treatment School were to be *automatically* re-classified as "Principal A" and "Vice-Principal A" respectively.

The Complainant gave detailed testimony about his routine responsibilities and special projects as a Supervising Teacher, Assistant to the Principal and Vice-Principal that I have not reproduced here. Suffice it to say that the Complainant's evidence as well as the testimony provided by witnesses called by the Complainant

and the Respondent was that he performed his duties well. He was given favourable appraisals (which were done on an annual basis) by various Principals: Mr. Gardiner from 1976 to 1980; and both Messrs. Powers and McCoy up to 1987.

These favourable appraisals by Principals were not disputed by Durham Board except indirectly, through the evidence of Lorrigia Ayot to whom the Complainant reported for his final few months of active employment and some minor recasting of written appraisals by Jack Gardiner at the hearing.

Setting aside Ms. Ayot's views of the Complainant, his supervising Principals and Superintendent have not assessed him as anything but satisfactory in the performance of his duties as Vice-Principal. I find for a fact that there was no evidence before this Board to suggest that the Complainant was not "promotable" because of poor performance as a Vice-Principal. I will deal with the need for the Complainant to obtain his Principal's and Superintendent's support for his promotion as well as the import of Ms Ayot's evidence in greater depth later in this decision.

2. *Allegations of direct discrimination*

The Complainant met Mr. Richard Winn, a black Vice-Principal in the Durham Board, for the first time in 1982 when they were assigned to share a cottage at an annual retreat for teachers. The Complainant surmised that they were bunked together because they were the only two black Vice-Principals within the Durham Board. In previous years he had been assigned to bunk with white teachers. As this assignment was likely done by teachers or support staff without the knowledge of, or direction from supervisory personnel at the Durham Board, I would not conclude that this assignment, standing on its own, is evidence of racism for which the Durham Board can be held liable.

Another matter that was cited by the Complainant as indicative of racial discrimination concerns a delay in recognizing his change in title and pay as the number of teachers that he supervised increased passed the threshold of eighteen. In the 1981 re-classification of the Complainant from "Vice-Principal, B" to "Vice-Principal, A", there was a significant delay in adjusting his pay and title. The adjustment was achieved after four months of intervention by the Complainant and his Principal on his behalf with Durham Board's staff. In contrast, the Principal with whom the Complainant worked, Mr. Gardiner, was immediately reclassified as a "Principal, A" with a salary increase. The four months delay in re-classification is a fact on which the Complainant relies in his allegation of racial discrimination.

Gardiner testified that as Principal of the treatment centre, his functions were typical of a Principal in a "regular" school but his position was not perceived as equivalent. In his testimony, Gardiner contradicted the Complainant and stated that his own reclassification to Principal 'A' took 3-4 months because of the Durham Board's sense that the treatment centre was different from the regular school system. He was unclear whether the Complainant's reclassification took an *additional* four months. The evidence of the Complainant that his reclassification took an additional four months was not contradicted. In Gardiner's view, the delay in the Complainant's reclassification had nothing to do with race. In my view, Gardiner's credibility was diminished at the hearing when he attempted to resile from the strong written statements commending the Complainant during performance appraisals conducted over 18 years earlier.

The Respondent Board offered no explanation for this delay, except to say that it took four additional months for the Complainant to be reclassified. The Principal himself had to advocate to achieve his own reclassification. No evidence was presented to establish what was undertaken by the Principal in this regard.

Absent any credible explanation for this delay from persons at the Durham Board who were responsible for effecting or managing the reclassification process, I am prepared to consider the delay in processing as a circumstance in support of a finding that the Complainant, the sole black teacher in a position of authority within the treatment schools, was treated adversely in the recognition of his enhanced status and pay.

Finally, the Complainant alleged that his race was explicitly made an issue by a Superintendent (Sheffield) during an interview in 1983, when he was asked why should he be made the Principal of a "white" school. In that same interview, a Durham Board Director (Monroe) who was on the interview panel, turned his back to the Complainant throughout the process except for a brief period to tell the Complainant "people make mistakes, you don't have to be so aggressive". These allegations are dealt with in more detail in the narrative below that chronicles the Complainant's attempts to obtain a promotion to the position of Principal.

E. The Complainant's attempts to obtain pre-requisites for promotion to Principal

1. *Approval to take Principal's course*

In 1977 and 1980, the Complainant applied to the Durham Board for permission to take the "Principal's course" offered by the Ministry of Education. He was refused permission on both occasions by the Superintendent. The refusal was communicated by way of letter. The letter was not produced at the hearing but the Complainant testified that the letter stated that "only those who expected to succeed would be accepted". According to the Complainant, he and Mr. Gardiner, his Principal, were upset by this letter. (For his part, Gardiner denied seeing this letter.) After the second refusal by the Durham Board, in 1980 the Complainant applied directly to the Ministry of Education and obtained the necessary permission to take the two-part "Principal's course". He successfully completed Part I in 1981 and Part II in 1982.

Cyrus Needham's testimony was that he too, a black teacher, needed to seek permission from the Ministry of Education directly after repeated denials by the Durham Board to permit him to take the Principal's course. More details of Needham's testimony will follow.

2. *Lateral transfers (rotations)*

Between the years 1977 to 1986, Nelson was unable to secure a lateral transfer to a Vice-Principalship in a non-treatment school, although he applied for between 6 and 8 such positions. Occasionally, he received interviews but no offers of transfers.

Nelson acknowledged that he was aware of the Durham Board's unwritten policy that a prerequisite for promotion to Principal, was that a Vice-Principal must serve at two schools, by way of a transfer, in order to gain diversity in experience. To this end, he started to apply for transfers in 1977. (Gardiner testified that during the late 1970's he had discussions with the Complainant and advised him to transfer out of the treatment system and get varied experience to aid in his promotion to Principal.) He had no success and in 1980, he decided to contact Durham Board officials directly, specifically Area Superintendent Don Peel, to advise him of his interest in a transfer. In 1981 in response to his request, he received an unfavourable interview. The Complainant sensed resentment from members of the interview panel (composed of Mr. Kettle, Superintendent of Education, Mr. Sheffield, Mr. Monroe and two others), and his transfer request was unsuccessful.

In contrast, Bill Haynes, a 34-year veteran of the Durham Board testified that he obtained the position of Principal without formally applying for it or being interviewed. His interest was solicited and then he was placed. Also, his eight transfers in his role as Principal came about in the same manner. Haynes confirmed that it was his understanding that the Durham Board viewed the Vice-Principal's position as a training ground for Principals and that this policy became formalized

after the municipality assumed responsibility for the school Board and began hiring its own Superintendents. Finally, Haynes confirmed that it was generally understood that if a Vice-Principal refused even an unsolicited request to transfer to another school, he or she would be “ending” his or her career advancement and would become a “career Vice-Principal”. This view of refusals of transfers was also shared by Don Peel, a personal Respondent and by Craig Birch, the Respondents’ main witness and advisor to counsel throughout the proceedings and by other witnesses for the Respondent - Norm Powers, Area Superintendent and George Marlow, retired Superintendent.

In 1982, the position of Principal at the Grove Treatment Centre, where the Complainant worked directly to assist the Principal since 1975, became vacant. The Complainant applied for the Principal’s position but was not granted an interview. The Durham Board did not at this time have any policies regarding criteria to become a principal, nor did it have a principal’s short list for promotion.

In the years 1983 to 1986, the Complainant persisted in his efforts to obtain a transfer from Grove Treatment Centre Schools and again called Mr. Peel, the Area Superintendent responsible for the treatment schools, to inform him of his need for a second Vice-Principal placement to complete his eligibility for promotion to Principal. In his testimony before this Board, Peel did not recall any of the discussions about transfers with the Complainant, excepting the Complainant’s move to R.H. Cornish Elementary School.

3. *Reduction of release time and increase of classroom teaching*

The Complainant also gave evidence relating to Durham Board’s granting of “release time”. Release time, as it was explained by the Complainant, is granted to allow an administrator to focus on his or her administrative skills to prepare for non-

classroom roles within the school Board. He stated that in 1969 when he started teaching at Grove Treatment Centre School, he was in the classrooms 100% of the time. Subsequently, as he progressed to "Supervising Teacher" and then "Assistant to the Principal" he made an arrangement between himself and a supervisor, a Unit Director, and was informally allowed one-half day weekly "release" to do administrative work.

A few years into this informal arrangement (1982), the Complainant sought to formalize his release time and discussed this with his Principal, Mr Gardiner, who in turn discussed the matter with Durham Board officials (See Exhibits 4 and 5). No formal release time was obtained. Nonetheless, he continued to assist with managing the Treatment Centre Schools (i.e Grove and others), and by November 1982 he was allowed up to 2.5 days release weekly to assist Mr. Gardiner with the administrative work (see Exhibit 5). As the Principal was responsible for the administration and management of all treatment centre schools within Durham, there was considerable travel involved to provide on-site management to approximately 7-8 centres and about 24 or more teaching and other staff. Eventually, the Complainant's requests for release time were approved and he obtained 100% release time in 1985. Norm Powers, past Principal of the treatment schools during the early 1980's, testified that he had sent a memo (Exhibit 7) to the Durham Board requesting that the Complainant be allowed 100% release time but this was not granted for some time because of the administration's perception that the treatment school was not a "legitimate" school. However, once the Complainant obtained 100% release time at Grove Treatment Centre School, he taught only at Summer school sessions, where he acted as Principal, teacher, organizer and administrator.

According to the Complainant, in Spring 1986, Mr. Don Peel responded to one of his many his requests for a rotation to a "regular school" and informed him of a vacancy at R.H. Cornish Elementary School, a non-treatment school, with a release

time of 50%. The Complainant felt this reduction from his current 100% release time was a demotion and said he needed to consult with his union, the Teachers' Federation.

For the Complainant, release time was an important factor in accepting a transfer. Another factor for consideration in the transfer was that the Principal at R.H. Cornish, Mr. Norm Powers, had worked with the Complainant previously at Grove Treatment Centre School and they enjoyed a positive professional relationship. A few days after Peel's offer of the transfer, he called the Complainant and withdrew the offer and stated that he (the Complainant) should wait until the next year as a transfer to R.H. Cornish would not provide the necessary diversity of experience sought by Durham Board because he (the Complainant) had worked with Norm Powers previously. The Complainant's view that R.H. Cornish was a significantly different school environment from Grove Treatment Centre School and would provide the necessary broadening of experience was ignored and he remained at Grove Treatment Centre School as Vice-Principal.

Mr. Peel's evidence, however, differs significantly from the Complainant's. Mr. Peel recalled virtually no discussion with the Complainant about transfers but did recall the specifics regarding the offer of R.H. Cornish. According to Mr. Peel, he made the decision to transfer the Complainant to R.H. Cornish school, because it was the best possible place: a full scheduled school, from kindergarten to grade six with a variety of programs, including special education classes. In addition, the school had two Vice-Principals so the Complainant would have assistance in his new role as he had no previous experience in the regular school system. In Mr. Peel's view, this transfer would have helped the Complainant establish credibility in the "regular" system and would gain him the necessary experience.

On the issue of release time, Mr. Peel testified that *he had no concerns with release time from 100% to 75%, as that was already the practice for the two Vice-Principals at R.H. Cornish*. Mr. Peel testified that he was aware that the Complainant was not pleased with the transfer offer as he did not want to go to a schedule with less release time than he had at Grove Treatment Centre School. He corroborated the Complainant's testimony that he agreed that the Complainant should remain at Grove Treatment Centre School until another transfer opportunity came up. He further indicated that he could not recall any Vice-Principal refusing to accept a transfer and that he was disappointed as he believed this transfer was proper for the Complainant's development.

In cross-examination, Mr. Peel, a personal Respondent, was unable to reconcile his offer of 40-50% release time to the Complainant (see Exhibit 48, para 23) with his own testimony that Vice-Principals at R.H. Cornish had an established practice of 75-100% release time. Also in cross-examination, Mr. Peel admitted that the Complainant's role as Vice-Principal in the "regular" system was no different from his role in the treatment schools. Mr. Peel acknowledged that the Complainant had made his aspirations clear when he applied for the position of Principal at the treatment schools after serving there under three Principals but Mr. Peel could not provide this Board with any explanation for the requirement of gaining "diversity" or experience in the "regular" school system.

Later in 1987, Mr. Peel offered the Complainant a transfer to Lake Vista Senior Public School, a non-treatment school, in south Oshawa with a release time of only 40%. This offer of less than half of the Complainant's 100% release time, twinned with the awaited transfer opportunity, was corroborated by Chuck Powers, Superintendent - Human Resources. The Complainant conditionally accepted this offer provided that he would be permitted 70% or more release time. Mr. Peel returned the call a short while later and advised him that 90% release time was

arranged and he should go and see the Principal at Lake Vista School, Mr. Ralph Rowe (see Exhibit 12 - letter from Mr. Peel). Mr. Peel testified that he could only offer the Complainant what the formula for release time dictated, based on the number of students, the number of periods and the number of staff. Mr. Peel agreed that creative methods are sometimes arranged between Vice-Principals and their Principals to increase release time, and that he recalled that an agreement was reached between the Complainant and his principal, Rowe, in this regard.

The Complainant commenced working at Lake Vista in August 1987. Mr. Rowe testified that he and the Complainant formulated a system for release time over and above the 50% that was permitted under Durham Board's formula as Lake Vista was a "special needs" school and he (Rowe) needed additional help with the general administration.

A little over a year later, in May 1988, Mr. Rowe advised the Complainant that he (Rowe) had been instructed by Superintendent Barry Vail, to reduce his release time from 90% to 40% at Lake Vista School. When the Complainant contacted Mr. Vail to discuss why he was ordering a reduction to 40% in his release time, Mr. Vail stated that it was out of his hands, and that he was instructed by Mr. Peel to order the reduction. Mr. Rowe testified that he perceived that the Complainant seemed to prefer administrative work over classroom teaching and encouraged him to do more teaching to enhance his chances of promotion to Principal. The Complainant took a different view of the matter: less than a year after he had negotiated double the release time the Durham Board had offered him with his transfer into the "regular" schools, he was effectively being demoted out of the administrative ranks through a halving of his release time.

No evidence was provided to this Board that "more teaching" would improve a Vice-Principal's suitability for promotion to Principal. None of the many Principals or

ex-Principals cited classroom teaching as a criteria that enhanced their success, nor did Durham Board officials identify any requisite number of years of classroom teaching as a pre-condition to promotion to principalship. The only references to "more teaching" being a requirement appears to have been directed at the Complainant after he had served over a decade as an administrator and indicated his clear objective of attaining a Principal's position.

The Complainant tried unsuccessfully for 3-4 days to discuss the proposed reduction in release time (and a corresponding increase in teaching responsibilities) by phone with Mr. Peel. He finally contacted the Co-chair of the Durham School Board, Ms. Heather Beverage, and soon thereafter a meeting was arranged between the Complainant, Mr. Mather (a Director), Mr. Peel and Mr. Chuck Powers (Superintendent, Human Resources). In his testimony, the Complainant expressed his view that the meeting was hostile, awkward and antagonistic, but he nonetheless attempted to deal with two issues: (i) the reduction of his release time and (ii) inclusion of his name on the "short list" of promotable Vice-Principals. During this meeting with senior Durham Board officials, the Complainant testified that he felt defeated and felt that "they had succeeded in breaking him". He told the Durham Board officials that he could not continue to become engulfed in the same frustrating process again and declared that he would be filing a complaint with his union, the Teachers' Federation, and the Ontario Human Rights Commission.

After the meeting with the Durham Board officials (Peel, Mather and Chuck Powers) around May 1988 concerning the halving of his release time, the Complainant ceased to apply for a transfer or promotion and continued to work as a Vice-Principal for the remainder of 1988 (under Rowe). He started the next school year under a new Principal, Ms. Ayot. In December 1989, he retired from the School Board after being on sick leave from April 1989.

F. The Durham Board's processes for assessing the Complainant's suitability for promotion

1. *Selection Interviews*

The Complainant commenced his application for Principalship before obtaining his Principal's certificate in 1982. Between 1980 and 1985, he applied for between 4 to 6 transfers as a Vice-Principal and between 1982 and 1988 he applied for five promotions to Principal.

The Complainant also confirmed that during 1977-1979, unlike other applicants, while applying for Principalship, he did not as yet have the required Principal certificate.

Notably, in 1982 the Complainant unsuccessfully applied for the position of Principal for the school in which he had served as a Vice-Principal since 1977. He applied again for the same position in 1985 and again he was unsuccessful; he was never interviewed.

During the early to mid-1980's, the Complainant applied continuously for transfers to Vice-Principal positions. He testified about a particular interview in 1983, where he was one of seven candidates interviewed by six or seven Durham Board officials. He testified that the interview did not go well from the moment he entered the interview room. Present were Mr. Monroe, Mr. Walker, Mr. Sheffield, Mr. Cornwall, Mr. Kettle and someone else, whose name he did not know. Mr. Monroe, a Director within the Durham Board, turned his back to the Complainant throughout the interview, except for a single utterance. When one of Durham Board's officials, Mr. Kettle, questioned the Complainant about his lack of a Master's Degree, the Complainant replied to the effect that had Mr. Kettle read his *curriculum vitae* he would have observed that he indeed had a Master's Degree. In response to this, Mr.

Monroe turned, faced the Complainant and commented, "people make mistakes, you don't have to be so aggressive" and again turned his back to resume his original position.

At the same interview above, Mr. Sheffield, a Superintendent of the Durham Board asked the Complainant why should he be made a Principal in a "white school", and informed the Complainant that if he were to have a disagreement with a white family, he should not expect the Durham Board to support him. The interview continued for approximately 10 minutes after this exchange and not surprisingly, the Complainant was not successful. The Complainant testified that he was disappointed and frustrated after that interview and his view that his race was the basis for his lack of progress within the Durham Board was reinforced.

It should be noted that Mr. Sheffield suffered a stroke and did not appear as a witness to give evidence. The Respondents therefore contend that there is no way of knowing if Mr. Sheffield actually made any derogatory comments to the Complainant. No evidence was produced to contradict the Complainant's statement regarding Mr. Sheffield's remarks. The Durham Board also conceded that there was no documentation maintained regarding the selection process for interviews for the "short list" or otherwise, nor were interview notes kept. The Durham Board indicated that they were unable to locate any documents with regard to the complainant's application for transfers or for permission to write the Principal's examination. It does concede, however, that it is quite possible that he did make these applications. The Board also indicated that its practice was to destroy all notes after the competition was concluded and that it is therefore, not surprising that there were no documentation to support its position on these events.

This allegation that Mr. Sheffield made the above racist comment during the Complainant's interview was raised in the cross-examination of one of the witnesses

called by the Complainant. Mr. Sheffield himself did not appear before the Board to testify, given his disability caused by a stroke. In the cross-examination of Mr. McCoy, former Principal for Treatment Centre schools, Respondent counsel asked if in his view, Mr. Sheffield could have made the alleged racist comment to the Complainant. Mr. McCoy responded that perhaps as an administrator he (Sheffield) might have made that comment but was unprepared to confirm the alleged comment as he was not present. Although Mr. McCoy identified Mr. Sheffield as a good friend, with whom he still socialized, he replied in a forthright manner that although he could not say for certain, it was possible that Mr. Sheffield could have made the alleged racist comment in his role of administrator. In my view, this witness gave clear testimony in a straightforward manner. He did not seem surprised by the allegation that his long-time friend and colleague made the alleged comment. This indicates to me that there was more than a possibility that these comments, or something similar was said by Mr. Sheffield.

Later in his career, during 1987, the School Board developed a list of promotable Vice-Principals, sometimes referred to as a "short list". The Complainant testified that he applied in October 1987 to be placed on the short list and obtained the necessary recommendations of his Principal and Superintendent (Exhibit 14).

After he succeeded in being included on the Principals' short list, the Complainant was advised that he would be scheduled for a two-part interview, one part in November 1987 and the other in January 1988, for assessing suitability for the position of Principal. Eventually, he attended two interviews in November, but the first interview had to be repeated as the tape recording equipment did not function. The results of these interviews were again unfavourable. Ms. Carol Yeo, a member of the interview panel, did not recall the malfunction of the tape recorder but recalled that while the Complainant had "paper qualifications", he lacked experience. In cross-examination, Ms Yeo admitted that her testimony concerning

the Complainant's "lack of experience" was not borne out by her notes (a profile), entered as Exhibit 28, that she compiled immediately after the taped interview with the Complainant.

A member of the 1987 second stage interview panel, Mr. Chuck Powers, recalled that in the post-interview debriefing session, the Complainant critiqued the interview process and expressed his view that the questions were inappropriate. These interview questions had been developed by senior Superintendents Bruce Walker, Don Peel, Bob Sheffield and Chuck Powers. Mr. Powers indicated the questions that the Complainant found inappropriate were the questions that the Complainant felt did not offer him an opportunity to talk about his strengths, but were asked to expose his weakness. However, he did not feel that the Complainant performed particularly well in the second stage interview compared to other candidates, and although he was unable to give specifics, he recalled that the Complainant talked incessantly.

Mr. Walker, hired as a teacher by the Durham Board 1957, retired in 1996 from the post of Superintendent, Community Services. In his final post he had responsibility for organizing a committee on ethno-cultural issues and at the hearing, he was asked to provide his assessment of the Complainant. He testified that he was a member of an interview panel that interviewed the Complainant in 1987 but that he had no direct supervisory relationship with him before or after that encounter. To the best of Mr. Walker's recollection of the interview conducted a decade earlier, his view was that the Complainant needed more experience in the regular school system before he could be promoted. According to his memory, as no notes were available for a refresher, the Complainant's interview responses on equity issues were solid but his awareness of "complexities" was weak. This witness' recollections were vague and uncertain and thus I give little weight to his cursory assessment of the Complainant.

When presented with Exhibit 16, a document with various findings on race and cultural issues written by Mr. Needham and the Complainant, Mr. Walker admitted that he discussed this document with its authors. He confirmed that he knew that they were both actively seeking promotion and he recalled telling them "not to expect things to change overnight". Mr. Walker was unable to recall what eventually happened to the document or its recommendations. It is noteworthy, however, that this senior Durham Board official, responsible for ethno-cultural matters, cautioned the Complainant and another black teacher, to temper their expectations by chiding them to not to expect prompt remedial action from the Durham Board.

2. *Principals' and other teachers' observations of the Complainant*

Mr. Jack Gardiner commenced his 23 year career with the Durham Board in 1974 at the Grove Treatment School. Prior to that, he had worked for 14 years with other school boards. At the Durham Board, Mr. Gardiner moved from the position of Liaison Consultant to the Principal of Treatment Centre Schools and later received other promotions.

Mr. Gardiner worked closely with the Complainant as Principal and Vice-Principal at Grove Treatment Centre school from 1974-1982. He testified that he found the Complainant to be congenial and good-natured, and they became good friends. Mr. Gardiner gave evidence concerning his involvement with the Complainant in the development of screening methods to assess students' level and to determine, among other things, their readiness to return to the regular school system. He referred to workshops and presentations of the Complainant's technique to colleagues and other personnel. He also conceded that in Exhibit 19, his 1980 appraisal of the Complainant, he gave a glowing assessment and in cross-examination, referred to the Complainant as his 'right hand man'. During his testimony in-chief however, Mr. Gardiner agreed with the Durham Board's proposition that the Complainant lacked the necessary experience for promotion as he had not gained experience in the

“regular” school system. Mr. Gardiner also gave his opinion that the instant complaint of racial discrimination is “fallacious” but offered no explanation for the denial of transfer opportunities for more than a decade and reduced release time that hindered the Complainant from gaining the required exposure.

Mr. Norm Powers, a Superintendent at the time of the hearing and called by the Respondents as a witness, did not believe that race was a factor in the Complainant’s failure to obtain a transfer or promotion. He directly supervised the Complainant for three years and provided him with a final appraisal (Exhibit 20) dated June 27, 1985. In this appraisal, Mr. Powers stated that the Complainant needed experience in the regular school system and should be transferred to gain the experience needed to become a Principal. He testified that he had great respect for the Complainant because he had outstanding ability and was a very bright person. Mr. Powers confirmed that the Complainant had given him invaluable assistance, and he spoke of the extent to which he relied on his competence. He had had a very agreeable relationship with the Complainant and he fully expected him to become a Principal once he spent some time as a Vice-Principal in the regular system.

Mr. Powers was unable to recall the events relating to the delay in change from ‘B’ to ‘A’ designation and was also unable to shed any light on the discussions between the Complainant and Mr. Peel about promotional opportunities. His evidence simply corroborated the Complainant’s own view of his performance as a Vice-Principal. Mr. Powers’ testimony was helpful in filling in aspects of the chronology of events in this matter.

Mr. Lewis McCoy supervised the Complainant for two years in the mid-1980s and recommended him highly for promotion to the position of Principal. Mr. McCoy retired from the Durham Board after 38 years in teaching. After serving as a Vice-Principal at a vocational school (Harwood), his Superintendent suggested that he

apply for the position of Principal at the Grove Treatment School. Mr. McCoy was interviewed and was successful in obtaining the position of Principal and the Complainant continued to serve at Grove Treatment Centre School in his capacity as Vice-Principal until he (McCoy) retired in 1988. According to Mr. McCoy's testimony, during his tenure as Principal, he placed considerable reliance on the Complainant's knowledge, competence and extensive experience in the treatment schools.

Mr. McCoy testified that in his discussions with the Complainant regarding his appraisal and career aspirations, he encouraged him to apply to become a Principal as he had the requisite academic qualifications and experience. In his testimony, he confirmed that he had prepared Exhibit 14, a text recommending the Complainant for Principalship, because he knew that the Complainant had the ability to be a good Principal. Specifically, Mr. McCoy called attention to the fact that including Grove Treatment Centre School, the Complainant supervised and directed 30 teachers throughout the treatment centre schools. As a supervisor, the Complainant had to make the same decisions as would a Principal, and he (McCoy) could not recall him ever making a wrong decision nor him creating any problems in the schools.

Mr. McCoy's dependence on the Complainant's knowledge and abilities was also echoed by teachers whom the Complainant supervised: Bowen, Needham and Sedore. In particular, Mr. Gary Sedore testified that the Complainant had a very realistic approach to education and encouraged teachers to vary their technique in order to reach their students. He also spoke favourably about the Complainant's contributions through his development of an "upscale" programme designed to determine a student's readiness to progress to the regular school system. This programme was presented at workshops and conferences and was successfully used in the treatment schools. Finally, Mr. Sedore testified that from his knowledge of

the Complainant's qualifications and his experience of working with him, he (Sedore) could never rationalize the lack of promotion to Principal.

Mr. Rowe, the Principal at Lake Vista School, got to know the Complainant when he succeeded in transferring to the "regular" school system in August 1987. At Lake Vista, the Complainant and Mr. Rowe worked together as Vice-Principal and Principal respectively for the 1987-88 school year. (In 1988, Ms Ayot became Principal at Lake Vista.) In his testimony, Mr. Rowe indicated that in his estimation the Complainant, like himself and others, could be provoked to lose his temper. Mr. Rowe declined to characterize the Complainant as someone who is easily provoked. Nonetheless, Mr. Rowe testified to this Board that he would *not* recommend the Complainant for Principalship because he needed "more practice". He held this view despite the fact that he signed a document in November 1987, Exhibit 14, recommending the Complainant for Principalship. When questioned about the inconsistency between his testimony and Exhibit 14, Mr. Rowe stated that he signed Exhibit 14 although he had no personal opinion concerning the Complainant's ability because he was influenced by Mr. McCoy's positive assessment of the Complainant's ability.

On the whole I found Mr. Rowe, a witness called by the Respondents, to be frank and open in the presentation of his evidence concerning his brief interaction during the Complainant's first year outside of the treatment school system. However, I am perplexed as to why this witness signed a document recommending the Complainant's promotion, without any discussion with Mr. McCoy, on whom he relied and without discussion with the Complainant. Given the brief period of interaction between the Complainant and Mr. Rowe, the contradiction between his testimony and the signed recommendation in Exhibit 14, and Mr. Rowe's (passive) role in the decision to reduce the Complainant's release time from 90% to 40%, I

am prepared to give very little credence to Mr. Rowe's assessment of the Complainant's need for "more practice" before being promoted to Principal.

Ms Lorrigia Ayot succeeded Mr. Rowe as Principal at Lake Vista and, in the first few months of her tenure, formed an entirely different view from Mr. McCoy of the Complainant. During cross-examination, Respondent's counsel asked the Complainant about the appraisal done by Ms Ayot. The Complainant responded that while he had some discussions with Ms Ayot about the need to complete an appraisal, he neither saw an appraisal nor participated in one. In his view, Ms Ayot's purportedly conducted her first appraisal ever as a Principal without his involvement and while he was on sick leave.

Mr. Chuck Powers, as a witness called by the Respondents, corroborated the Complainant's evidence regarding the events of 1989 while he was on sick leave. Mr. Powers stated that he had two conversations with the Complainant, whose major concern was the reduction of his release time from 90% to 40% and pressure from his current Principal (Ayot) to do more teaching. He confirmed that he was aware that Ms Ayot was not entirely happy with the Complainant's performance at Lake Vista School, and that it was common knowledge that Principals had discretion over release time and may give their Vice-Principal generous release time at the expense of other parts of the school program. Ms Ayot affirmed that the Complainant had expressed his dissatisfaction with having only 40% release time as he was responsible for teaching mathematics and geography as well as his administrative duties that included disciplining students, resolving issues relating to scheduling (timetable conflicts) and the use of supply teachers.

Ms Ayot's evidence at the hearing was that she initially took the Complainant at "face value". She recounted that her first real meeting with the Complainant, was at the close of the school year of 1988 when she attended a meeting at Lake Vista

School and the Complainant introduced himself to her. Ms Ayot confirmed that the Complainant took her on a tour of the entire school, and that during the orientation tour he was genuinely friendly and hospitable.

Nonetheless, Ms Ayot's criticisms of the Complainant appears to have begun immediately, as she testified there were "two unusual occurrences during the tour". She questioned him about a special education class on the second floor which they had visited and she asked about a teacher, Bob Smith, because she found it "odd that he had maps around him". She recalled that the Complainant's answers were unsatisfactory and he did not appear to know what was happening in each of the classrooms. She testified that she later ascertained that Mr. Smith taught geography. This Board also heard evidence that the Complainant also taught geography and it appears that Ms Ayot had not considered the possibility that she herself was unclear in her questioning of the Complainant while he attempted to orient her to her new school. She instead formed a negative opinion about his competence from their first contact.

To aid her testimony, Ms Ayot referred to copious hand written notes and indicated to this Board that "it was her practice to make notes". She referred to Exhibit 34, notes relating to incidents when parents complained about the Complainant's manner in dealing with their child who was sent home from school and another who was suspended. She testified that she discussed these matters with the Complainant, specifically, his use of diplomacy and tact. One other incident of note recorded by Ms Ayot dated January 18, 1989 states that the Complainant informed her that he was considering his career options, including transferring or leaving the profession. Ms Ayot testified that she was "shocked" by the Complainant's remarks as she felt that they had a good working relationship. She informed the Complainant then that she would keep daily notes on him. Her rationale for this was that she was concerned that parents would sue the Durham Board and she wanted to be prepared.

She went on to record seven additional incidents relating to the Complainant between January 24, 1989 and March 3, 1989. These incidents largely involved supply teachers, timetable conflicts and concerns that the Complainant was inaccessible.

In April 1989, the Complainant sent a medical certificate to the Durham Board that indicated that he might be off work for an extended period. Ms Ayot, in her testimony, took exception to the fact that the Complainant had not notified her directly that he was off on sick leave. Both she and school staff were concerned and called him at home although she was aware that he had sent a certificate to the Board.

Exhibit 33 is Ms Ayot's performance appraisal of the Complainant for the seven-month period in which they worked together. She assessed his performance as below standard and stated that she would not recommend him for Principalship. The appraisal was dated June 30, 1989, during the time the Complainant was home on sick leave. The Complainant refused to look at or sign the appraisal, even after she made numerous calls to his home requesting that he review the appraisal. She subsequently mailed it to the Complainant after consulting with her Superintendent. She admitted that she sent the appraisal although the Complainant asked her not to send it and she could not explain why the cover letter did not mention that the appraisal was enclosed.

No evidence was provided as to whether these incidents or concerns were raised with the Complainant in a timely manner and whether any workable solutions were found. Also, this Board did not hear any evidence of what "Vice-Principal's" responsibilities were off-loaded from the Complainant when his teaching responsibilities were increased and his release time halved in the changeover from Mr. Rowe, an experienced Principal, to Ms Ayot. (Mr. Rowe indicated in his

testimony, that as Lake Vista was a “special needs” school, that he required additional help from the Vice Principal with general administration.) Nor was there any evidence before this Board to demonstrate that “accessibility” and “diplomacy” concerns, and the management of timetable conflicts were beyond the ordinary expression of a system with scarce resources to attend to administrative details. In my view, the Complainant’s contention is reasonable, that is, that these concerns were likely the outcome of the initiation of an inexperienced Principal during the same period that the experienced Vice-Principal’s release time was halved.

In light of the prior favourable assessments of the Complainant as an administrator for over a decade, I am not prepared to accept Ms Ayot’s view as a reasonable one, that is, to treat the challenges of her first months at Lake Vista as a poor reflection on the incumbent Vice-Principal whose release time had just been halved and who was being pressured to take on more teaching responsibilities. Rather, I am persuaded by the written performance appraisals spanning more than a decade as well as by the oral testimony at the hearing that the Complainant was a competent administrator and an innovative teacher.

G. Durham Board’s Promotion Practice

1. *Witnesses’ personal experiences of promotions*

There was evidence from the Respondents’ and Complainant’s witnesses (Birch, McCoy, Haynes and Yeo among others) that confirmed the Complainant’s testimony that the various written and unwritten requirements were not strictly enforced and in many instances were waived by the Durham Board in its promotion of white teachers to the positions of Vice-Principal and Principal.

Mr. McCoy, a teacher of 38 years who retired as a Principal at Grove Treatment Centre School, was uncertain if the Board had a practice or policy requiring Vice-

Principals to rotate through more than one school before being considered for the position of Principal. In his experience some were rotated and others were not. Mr. McCoy testified that he was solicited by his superiors in the Durham Board for his interest in a promotion, interviewed, then placed as a Principal.

Mr. Bill Haynes, a teacher of 34 years who retired as a Principal in the Durham Board also testified that: he was solicited and he was subsequently placed as a Principal *without* an interview and *without* serving as a Vice-Principal; and as Principal, he rotated through eight schools although he never once sought out a transfer.

Ms Carol Yeo, a teacher of 35 years with the Durham Board was hired in 1961. She was promoted to Principal *without* serving as a Vice-Principal after an interval as a Special Education Consultant.

Mr. Ralph Rowe served as a Principal at Durham Board for 29 years and obtained that position *without* first serving as a Vice-Principal.

On the other hand, Mr. Craig Birch, hired as a teacher in 1974 and promoted to Superintendent of Employee Relations at the time of the hearing, served as a Vice-Principal for ten years (six years in an acting role during the 1980's). During his examination-in-chief by Respondents' counsel he testified that his decade of service before promotion to Principal was common. On cross-examination, however, he admitted that data (filed as Exhibits 48, 48A, 48B, 48C), compiled by the Durham Board at the request of Complainant's counsel, showing 90% of the 246 Vice-Principals in Durham rotated positions in four years or less was correct. Mr. Birch also agreed that the Durham Board did not have a clear policy that a Vice-Principal had to work in at least two schools to gain "diverse" experience before a promotion.

Ms Sandra Dean, another witness called by the Respondent, contradicted Mr. Birch in part, testifying that a "minimum" of four years with at least two Principals was needed to be considered for promotion from the position of Principal. In her own case, Ms Dean achieved the necessary rotation to serve as Vice-Principal for two Principals within four years and was promoted to Principal with this "minimum" experience requirement.

Ms Lorrigia Ayot, also called by the Respondents, was promoted to Vice-Principal in 1984 and four years later assumed the Principalship at Lake Vista as a direct supervisor of the Complainant. No evidence was led as to whether she served in two or more schools or whether she had experience in the treatment school system before her appointment as Principal.

Mr. Richard Winn, a black Principal called as a witness by the Respondents, testified that he served as a Vice-Principal for 11 years during which time he obtained his Master's Degree. Soon after completion of the degree and on his first application for Principal, he was promoted. This witness candidly admitted to being surprised at his quick success. (He was promoted after the instant complaint was initiated.) There was no evidence regarding whether Mr. Winn worked at two or more schools and whether these schools were at different levels (elementary and secondary) during his eleven years as a Vice-Principal.

Mr. Bruce Cornwell was employed by the Board for about 21 years before retiring in 1987 from the position of Principal. He could not recollect the Board having a policy on transfers, written or otherwise. In his view, transfers were effected on an *ad hoc* basis and there was no policy to rotate every 3-5 years, nor was there a system for moving Vice-Principals from one school to another. He was transferred often, sometimes at his request but at other times he was asked. Mr. Cornwell, a

witness called by the Respondent, was clear and forthright in his testimony but was unable to shed new light on the matters in issue.

2. *Promotion barriers because of the “stigma” associated with treatment schools*

Counsel for Durham Board repeated some of her opening statements to this Board in her cross-examination of the Complainant, and suggested to him that the delays and difficulties in his obtaining transfers out of treatment schools were due to the “stigma” attached to those schools. The Complainant adamantly rejected that explanation and reaffirmed his testimony that it was his observation for over a decade that white teachers and Principals, whether they were associated with treatment or regular schools, were able to transfer readily between schools while black teachers were routinely denied transfer requests. The Complainant argued with counsel that any “stigma” that operated against treatment schools would adversely affect black teachers. The Complainant testified that it is his belief that the records of the School Board clearly shows that the entry point for the vast majority of black teachers in the Durham Board was the treatment schools, while white teachers entered through the “regular” schools.

Furthermore, the Complainant testified from his experience as a Vice-Principal in both a treatment school and a “regular” school, teaching in a treatment school was in fact more difficult and required enhanced skills to effectively deal with children at different grade levels while adhering to the Durham Board’s curriculum. This view was shared by Mr. Gary Sedore, a witness with 14 years of experience as a teacher with the Durham Board, who spent some time in the “regular” schools before moving into the treatment school system. Finally, treatment schools were geographically spread out in different locations, thus making his supervision of them (as Vice-Principal) more demanding.

The Complainant testified that in comparison to Principals who came into the treatment school system from “regular” schools, his qualifications and experience were at least equal. Nonetheless, he was never promoted to Principal at the treatment schools even though he was highly recommended for the position by each of his supervising Principals.

The issue of teacher competence was again raised by the Respondents in the cross-examination of Mr. Ken Bowen and Mr. Gary Sedore, a black and a white teacher respectively, who were called as witnesses by the Complainant. In response to direct questions concerning the competence of the teachers in the treatment schools in comparison to teachers in the regular school system, Mr. Bowen expressed the view there was no difference in the level of competence. He felt it was more difficult to teach in the Treatment Schools as teachers had to be more proficient because they dealt with troubled students. This view was also shared by Mr. Gary Sedore and Mr. Cyrus Needham, another black teacher with over two decades of experience in the Durham Board.

Mr. Norm Powers, currently an Area Superintendent, was called as a witness by the Respondents. He commenced employment with the Durham Board in 1969 as a classroom teacher. After eight years of teaching, he became Vice-Principal and obtained a rotation to another school two years later. He was then promoted to Principal at the treatment centre schools in 1982 after a total of five years as a Vice-Principal. In the Spring of 1982 Mr. Powers was on the Principal’s short list and he applied for the position of Principal for Grove Treatment School. He was interviewed and was successful. By the end of his tenure at the treatment school in 1985, the program for attaining credits in the Treatment Schools gained some profile and he sent a written report to the Durham Board referring to this progress. This, he felt was necessary as in his view the administration in the “regular” school system had no real understanding of the tutoring accomplishments of treatment schools.

This lack of understanding contributed to the difficulty experienced by teachers wanting to transfer from the treatment centre because the role of teachers differed in both systems.

In cross-examination Mr. Powers cited the names of several teachers who transferred out of the treatment centre schools. All of them were white. On the other hand, he could not recall that the Complainant and another black teacher, Mr. Eric Weir, had any difficulty obtaining a transfer. Indeed he “thought [the Complainant] and Mr. Weir were happy at the treatment centre”.

3. *Pre-requisites for Promotion*

(a) *Unwritten Requirements*

The Complainant and other witnesses, including those called by the Respondent, acknowledged that there was an unwritten rule that a prospective Principal should successfully complete the “Principal’s course” and obtain a position and serve as a Vice-Principal. To gain admission to the Principal’s course, permission from both the teacher’s immediate supervising Principal and the Superintendent were required.

Other unwritten rules concerned the breadth of knowledge and experience a candidate required: possession of a Master’s degree; Vice-Principalship in a minimum of two schools or working with different Principals in the same school; and experience in all three school levels i.e. primary, intermediate and senior. There is some disagreement among the Respondents’ witnesses about whether there was in fact a requirement for exposure at all three levels. The latter rule was related at the hearing by Mr. Chuck Powers, Superintendent, Human Resources who served as a panel member in the Complainant’s last interview for principalship in 1987. Another panel member at that same interview, Mr. Bruce Walker, the Superintendent responsible for

the Grove Treatment Schools in the mid 1970s who was a former supervisor of the Complainant, disagreed with Mr. Chuck Powers' assessment. Mr. Walker acknowledged that in his observation of the Durham Board's practice for over twenty years, and the policy outlined in Exhibit 54, there is *no* requirement to be exposed to all school levels.

Finally, a rule emerged in the mid 1980's that a candidate needed to be included on a "short list" of "promotable" Vice-Principals. To be placed on the "short list", a candidate required the endorsements of his or her supervising Principal and the supervising Superintendent.

(b) *Documented Requirements*

The above requirements remained unwritten and sometimes undisclosed to aspiring candidates (eg. Mr. Cyrus Needham) until Mr. Craig Birch, current Superintendent of Employee Relations, documented them in 1987 under the heading "Promotion - Practice and Guidelines" (Exhibit 48). Mr. Birch was the Respondents' counsel advisor during the hearing. His evidence was useful in attempting to clarify some of the policies and practices of the Board, but he had no real contact or involvement with the Complainant or the events in issue in this complaint. This witness was straightforward in his testimony concerning Durham Board's policies but was inconsistent and less reliable in his testimony about actual practice and outcomes.

Mr. Birch testified that presently, competition to become a Vice-Principal or Principal within Durham Board was fierce as there were only 90 elementary schools, and about one-half of them have Vice-Principal positions. Usually, there are about 20-30 applications for each Vice-Principal position, and there was a pool of 2,500 elementary school teachers from which to draw. To the best of his knowledge, since the late 1970s, recommendations were required

to accompany applications for promotions. He was unable, however, to produce any supporting documents. In his own case, he was *asked* to become an Acting Vice-Principal in 1981 and *was not required to apply with recommendations* as he stated was the practice.

Mr. Birch described in detail the job competition process at Durham Board that included the following steps: posting of vacancies; establishing a selection panel which includes at least one woman; conducting the interview; and, ranking of the applicants. In relation to selecting applicants for promotion interviews, Mr. Birch testified that an "above standard" performance appraisal rating was necessary and that an "outstanding rating" was not, supported by Exhibit 55 dated 1984, which identifies necessary prerequisites in order to apply for Vice-Principal or principal positions. He noted, however, that in 1983 the Durham Board changed its standard and it became necessary to get an "outstanding" rating in performance appraisals if one had aspirations to be promoted. In terms of the questioning of applicants at interview, Birch indicated that he did not believe that an applicant's cultural or ethnic background was considered as a factor and he was unaware whether persons of colour responded differently to particular interview questions. Finally, according to Mr. Birch, the Durham Board did not keep records concerning applicants for Vice-Principal or Principal competitions.

Mr. Birch gave extensive evidence relating to Durham Board's evolving policies related to promotional practices and equity matters, outlined in a number of Exhibits, specifically:

- i. Exhibit 48, "Promotion, Practice and Guidelines" prepared in 1987
- ii. Exhibit 49, a document that outlines a release time formula prepared in 1991 (*post-complaint*)
- iii. Exhibit 50, Employment Equity Policy, dated 1995 (*post-complaint*)

- iv. Exhibit 51, document dealing with affirmative action prepared in 1992 (*post-complaint*)
- v. Exhibit 52, the Durham Board's Anti-Racism Policy prepared in 1995 (*post-complaint*)

4. *Adherence to promotional rules, survey data and other evidence of practice*

Ruling

During Mr. Birch's testimony, Respondent's counsel objected to him being cross-examined on the information contained in Exhibits 48, 48A, 48B and 48C, stating that while the Durham Board put together these documents and the information contained therein, he (Birch) could not attest to the reliability of that information. Complainant's counsel countered that she did not indicate the purpose for which documents were to be used and was not obligated to do so. The documents were in fact prepared and organized by this witness and he can therefore speak to the information stated therein.

Respondent's counsel then objected to Mr. Birch identifying the documents as Mr. Birch compiled the Durham Board's response to the complaint (Exhibit 48) and other documents, but he was not the author of the appended supporting documents, and said that the authors of each document should be called to authenticate them.

Respondent's counsel requested a ruling in the Board's final decision on this matter. At the time of the objection, this Board ruled that the documents could be admitted into evidence and an assessment would be made after all the evidence was heard, and appropriate weight would be given during the decision making process.

I have decided that the documents in question were fairly and properly entered into evidence, and the evidence relating to them will be given proper consideration. These documents were requested by Complainant's counsel and were prepared and compiled by the Respondent Board. They are authentic documents of the Durham Board (this was never disputed), although Durham Board's counsel characterized them as "unofficial". Further, the information contained in these documents is properly provided to the other parties by the Durham Board, to allow for a full and fair hearing of this matter to take place in accordance with the Board's Rules of Practice and the *Statutory Powers Procedure Act*. Counsel for the Complainant properly requested them given their relevance to the issues in this complaint and their unavailability by other means.

Mr. Birch testified that he was not surprised by the conclusions drawn from the lists (48B and 48C): of the 246 Vice-Principals in the Durham Board, 189 (nearly 75%) rotated schools within two years, of which 41 (16%) spent less than a year before obtaining a rotation; and in all, about 90% obtained rotations in less than four years; another 15% spent more than two years but less than four before being rotated. On the other hand, he also confirmed that there were a number of Vice-Principals (less than 4%) who served for more than seven years at one school.

Durham Board made no real attempt to test the accuracy of the data entered through the disputed exhibits at the hearing. The only confirmation of reliability of the data was provided by Mr. Birch, an experienced senior staff of the Durham Board who was the Respondents' main witness. I will give little weight to the documents themselves because of the insufficiency of effort by either counsel to establish the reliability of the data. Finally, while I give little weight to Exhibit 48, 48A-48C, I will give considerable weight to Mr. Birch's

testimony that concurred with the conclusion drawn from the data: the overwhelming majority of Vice-Principals rotated without the long wait that the Complainant experienced; and many teachers, all of them white, who were less experienced and less qualified than the Complainant were promoted to Principal during the period that the Complainant actively sought to be promoted.

The Complainant's testimony was that he spent over 11 years as a Vice-Principal despite his early and sustained efforts to obtain a Principalship.

While academic qualifications and teaching experience appear to be readily quantifiable and thus be used consistently as a screening device, it appears that these were not applied consistently at the Durham Board. Mr. Birch agreed with Complainant's counsel that the Exhibits 48, 48B, 48C, compiled by the Durham Board, indicate that a considerable number of teachers who were promoted to the position of Principal had less academic qualifications and less teaching experience than the Complainant.

Mr. Birch's evidence also corroborated the Complainant's statements that he was more qualified than most of the Vice-Principals who were promoted to Principal between the years 1977 to 1988. Furthermore, all those promoted were white. On reviewing Exhibit 53, a document compiled by the Respondent entitled '*Historical Information - Principals and Vice Principals*', Mr. Birch also agreed that some Vice-Principals were promoted to Principal even though they served at only *one* school.

Mr. Richard Winn, a black Principal, was put forward by the Respondents to support the proposition that long serving "career" Vice-Principals occupy that position by choice. Mr. Winn, hired in 1964, was promoted to Vice-Principal

in September 1981. He remained at that post for eleven years and during the last three or four of those years, he actively pursued a Master's degree. On completion of his Master's, Mr. Winn applied for and was appointed to the post of Principal on his *first* application in 1991/1992. In his testimony, Mr. Winn frankly admitted that he was surprised at his success as he was aware that it was common not to be promoted until after two or three attempts. Mr. Winn's application for and promotion to Principalship occurred after the instant complaint was formally filed with the Commission.

H. Black teachers within the Durham Board

1. *Numbers of black teachers in the Durham Board*

Aside from his personal knowledge and impressionistic evidence that he gathered over his thirteen years with the integrated Durham Board, the Complainant also put before this Board data he gathered in his last year of work. This data was included in a report he co-authored entitled "*Race and Equity*" dealing with the under-representation of visible minorities in the Durham Board (Exhibit 16). In February 1988, the Complainant and his co-author, Mr. Cyrus Needham, at the request of the Superintendent, Mr. Bruce Walker, participated in a committee to respond to recommendations made by the Ministry of Education. The Ministry's recommendations were contained in a report entitled "*Race Relations and Multicultural Equality*" and the Complainant and Mr. Needham focused on two areas dealing with staff development and race relations. In this connection, they conducted a survey by telephone of all schools within the Durham Board (both elementary and secondary) to ascertain the make-up of racial minority (i.e. facially non-European) teaching staff and students. Their research revealed that out of 4,200 employees (teachers and staff), about less than 10% were considered visible minorities and other excluded ethno-cultural groups, with a high concentration of non-white students and teachers in the Board's vocational schools, as per the following:

- (a) percentage of visible minorities among the student population was 15% in elementary schools and 7-10% in secondary schools; when others who might be treated as minorities, because of their religion, language or culture, were counted, the percentage in elementary schools increased to 20-25% and 15-20% in secondary schools;
- (b) less than 0.6% of the Durham Board's four thousand plus employees (teachers and support staff) were visible minorities;
- (c) the highest ranking visible minority in the secondary schools was a classroom teacher; and
- (d) only three Vice-Principals in the elementary school system were visible minorities.

Prior to the February 1988 request by the Superintendent to the Complainant and Mr. Needham, Mr. Needham had expressed an interest in the subject matter of promotion of minorities within the Durham Board. In 1976, after considerable persistence, he was granted permission to attend a conference on Race and Ethno-Cultural Issues convened by the Ministry of Education. After the conference, he prepared a report for his supervisors concerning the need for school boards throughout the province to refrain from denying real opportunities to minority teachers.

2. *Position of black teachers in the Durham Board hierarchy*

Upon the 1977 across-the-board re-classification of "Assistant to the Principal" to "Vice-Principal, B", the Complainant became the first and only black Vice-Principal in the combined population of treatment schools and non-treatment schools within the Durham Board. According to the Complainant, his status as Vice-Principal within the Durham Board clearly arose from his earlier promotion to "Assistant to the Principal, B" within the treatment schools when they operated under the Ministry of Health and is not evidence of the Durham Board's promotion practice in relation to black teachers.

In 1981, the Complainant became the second black "Vice-Principal, A" in the Durham Board. The other black Vice-Principal was Mr. Rick Winn who had attained this level (through the "regular" school system) in 1980.

In the 1988 survey conducted by the Complainant and Mr. Needham, only three minority Vice Principals were identified out of a teaching body employed in 99 schools in the Durham Board. The Durham Board did not refute the testimony of the Complainant and others (eg. Mr. Needham) that the Treatment Centre schools were the entry points for the majority of its black teachers. Nor did the Durham Board attempt to refute the Complainant's evidence that black teachers, with the exception of the Complainant and three or four others, were confined to classroom duties. The Complainant and Mr. Needham were both long-term employees of the Durham Board who had positions as teachers for thirty and twenty-five years respectively, with nearly all of them with the Durham Board. In my view, their evidence of their direct observations of the Durham Board's policies in action over that large time span is credible and establishes a *prima facie* case in support of the Complainant's allegations that experienced and qualified black teachers were in large measure excluded from positions of authority within the Durham Board relative to white teachers.

In establishing a *prima facie* case, the onus starts with the Commission and the Complainant to prove a *prima facie* case. Once that is done, the evidentiary onus then shifts to the Respondent to provide creditable explanation, showing that the treatment of the Complainant occurred for reasons which are not discriminatory. However, the Commission or Complainant retains the ultimate burden of proving a Code violation, on a balance of probabilities.

3. *Similar fact evidence of black teachers in the Durham Board*

Ken Bowen

Mr. Ken Bowen, a witness called by the Complainant and a teacher in the treatment schools, corroborated the evidence of the Complainant regarding the preponderance of black teachers in the treatment schools relative to the numbers in the “regular” schools. Mr. Bowen, a black teacher, also gave evidence of difficulties he experienced in obtaining a transfer out of the treatment schools (he never succeeded) and expressed his view that the Durham Board “patronized” and “stigmatized” teachers in treatment schools, presuming that they were less competent than their counterparts in the “regular schools”. Mr. Gardiner, the Complainant’s Principal in 1976, agreed with this perception that the Durham Board perceived the treatment schools as “fringe”.

Eric Weir

Mr. Weir started teaching in 1975 with the Toronto Board of Education and took a two-year leave to teach at a high school in Jamaica. On his return to Canada, he began teaching with the Durham Board in 1978, and taught for 19 years at the Grove Treatment School.

In his evidence, Mr. Weir stated that the Complainant was his Vice-Principal when he started at Grove Treatment Centre School. He (Weir) had ambitions to become the head of a department, expand into guidance and to obtain further promotions. For these reasons, he obtained a Masters in Special Education and training in both Adult Education, and Guidance Education.

Starting in 1982, he made his first attempt to obtain a transfer out of the treatment school but was unsuccessful. Thereafter, his transfer attempts were almost annual, totalling between ten and fifteen. Despite his additional training, he obtained only

eight interviews for transfers and in all cases he received a phone call informing him that he was unsuccessful. No follow-up review or additional information was ever provided to him. After May of 1993, he made no further applications to transfer out of the treatment school system.

In cross-examination, Mr. Weir agreed with Respondents' counsel proposition that the field of guidance was a highly desired and competitive area. He also agreed that the Board was entitled to select the best qualified person for the position, but testified once more that he was himself objectively qualified and had more educational training and experience than other non-black applicants who succeeded. He concluded that his additional training should have given him an "edge" and that it was his observation over a period of more than two decades at the Durham Board that promotions were not governed by merit and the best qualified teacher was not always successful.

I found this witness to be sincere in his evidence that was presented plainly and without embellishments. His frustration at the roadblocks and his unsuccessful promotion attempts was evident. Nonetheless, I found him to be credible in his evidence concerning over a decade of the Board's promotion practice as it pertained to him, a black teacher.

Cyrus Needham

Mr. Needham, a black teacher who retired in 1996 after more than 25 years of teaching, gave evidence respecting his own efforts to take the Principal's course that paralleled the efforts made by the Complainant. Mr. Needham testified that after applying for permission and being rejected by the Durham Board, he applied directly to the Ministry of Education in 1982. Like the Complainant, Mr. Needham testified that while he was obliged to appeal to the Ministry for permission to take the Principal's course, white teachers who applied to the Durham Board at the same time

were all approved, and he, the only black applicant, was rejected. With the Ministry's permission, he was accepted and successfully completed the two-part Principal's course in 1983.

Mr. Needham also testified about his efforts to become a Vice-Principal, indicating that although he applied, receipt of his applications was never acknowledged, nor was he ever granted an interview. He recounted discussions with his supervisors concerning promotion to a Vice-Principal position, and suggestions of possible problems for a department head in the treatment schools moving into the "regular" schools. He recalled a specific discussion with Mr. Snodden, one of his supervisors, who suggested that he may be up against systemic racism in his efforts to advance. He also recounted one of his last attempts (about 1988) to get promoted to Vice-Principal where Mr. Parrot, a Principal, informed him that he (Needham) was more qualified than the successful candidate, but rationalized that "we have to employ people who have a possibility of promotion". After this exchange, he became convinced that because he was black he would never be promoted and he made no further applications for promotion.

Mr. Needham concluded his evidence in chief by expressing that the fact that he was black clearly prevented him from becoming a Vice-Principal, as not only did less qualified white teachers with less experience make it to the "short list", but they were actually appointed Vice-Principals. He also admitted that while he sought promotions he did not have the requisite signatures of his Vice-Principal and Principal as he was not aware that these were required. This information was not available in any written documents, nor was he advised of these requirements.

In an attempt to discredit this witness, the Respondents put forward a 1987 letter of appraisal from a former Principal, Ms. Beal, that alluded to Mr. Needham's conduct in dealings with certain students. Mr. Needham flatly denied having seen or

having knowledge of the document or allegations mentioned in them, and became extremely distressed and displayed shock at the contents of the letter. This document was introduced during Mr. Needham's cross-examination, as Exhibit 44. No objection was made by counsel for either the Complainant or the Commission. Mr. Needham, vehemently denied ever seeing this "appraisal letter" or of having any discussions with Ms. Beal regarding the incident it described. Mr. Needham's testimony on this matter is uncontradicted by any of the witnesses called by the Respondents. Ms. Beal was not called as a witness.

Mr. Dave Snodden, a Superintendent responsible for recruitment, was called by the Respondents to give evidence concerning Mr. Needham's character. From counsel's submission, it became clear that she only intended to put questions to Mr. Snodden concerning Mr. Needham's character and by extension his credibility. As these matters were not raised with Mr. Needham during his testimony before this Board, I declined to hear this testimony.

I found Mr. Needham's evidence to be supportive of the Complainant's testimony. Mr. Needham gave his evidence in a forthright manner and was firm in his recollection of the workings of the Durham Board and the details of his personal experiences that mirrored the experiences of the Complainant.

4. *Race as a factor in decisions by the Durham Board*

As stated earlier in this decision, the Complainant gave uncontradicted evidence of his reception during an interview: his response to an interviewer's oversight of his Master's degrees was characterized by Mr. Monroe as "aggressive" and Mr. Monroe turned his back to him throughout the interview except to admonish him; he was informed by Mr. Sheffield that he should not expect the Durham Board to support him in the event that there was a complaint from a "white" family; and, he

was challenged as to why the Durham Board should make him a Principal in a “white” school.

Mr. Bill Haynes, a teacher with over thirty years of experience with the Durham Board, gave forthright and clear testimony regarding transfers, promotions and his personal experience of obtaining both without seeking out recommendations or being interviewed. He also gave evidence of one incident that stood out in his dealings with Mr. Chuck Powers, Superintendent with responsibility for Human Resources. Mr. Haynes testified that in a discussion regarding a teacher who sought to move from the Windsor Board to the Durham Board, Mr. Powers pointed out to Mr. Haynes that she was black. Mr. Haynes recalled responding that her race did not matter to him. When Mr. Power was later examined in chief by the Respondents’ counsel, he was not asked to respond to the comment around the Windsor incident.

According to the testimony of Mr. Craig Birch, Superintendent Employee Relations, the Durham Board did not consider applicants’ culture or ethnic background as a factor in its promotion decision. I am satisfied, however, that while Durham Board did not have an articulated policy to deny promotional opportunities based on an applicant’s cultural or ethnic background, there were sufficient examples of irrelevant references to the race of the Complainant and a Windsor teacher by management staff (Sheffield and Chuck Powers), during interviews and/or discussions about transfer opportunities, as well as admonishments to black teachers who advocated for equitable practices (Nelson and Needham) by Superintendent Bruce Walker “not to expect things to change overnight”, to support an inference that transfer and promotion decisions were indeed influenced by consideration of race. Furthermore, I find that the Durham Board’s concession of “discrimination against everyone in the treatment schools”, tacitly ignores the disparate impact on the promotional opportunities of the black teachers for whom the treatment school is a significant, if not the main, entry point to employment. Finally, I find that Mr.

Monroe's conduct during the complainant's interview was egregious and created a climate of racial hostility, that was tolerated by other Durham Board officials.

PART VI - FINDING OF LIABILITY

On the evidence presented, I find firstly, that of the twenty witnesses presented by all the parties, more than one-half shed very little light on relevant or disputed matters. The facts as presented regarding the Complainant's education and work history are undisputed. He is highly educated, more than many others in his former position within the Durham Board. His work history is impeccable and unblemished, save for the testimony of Ms. Ayot which I find unreliable and reflective of her own inexperience as a Principal. I find for a fact that there was no evidence before the Board to suggest that the Complainant was not promotable because of a lack of educational qualifications or poor performance as a Vice-Principal.

With regard to inferences to be drawn from the evidence, I accept the test by B. Vizkelety in her book Proving Discrimination in Canada (Toronto: Carswell, 1987) page 142 ... "that an inference of discrimination may be drawn where the evidence that is offered in support of it renders such an inference more probable than the other possible inferences or hypotheses". This test has been accepted in many cases, among them:

Balbin Basi v. The Corporation of the District of Matsui, Matsui Police Service
(1988) 10 C.H.R.R. D/5800 at para 42571

and,

O.H.R.C. and Matsuinch Abdolalipour and Raed Murad v. Alfred Chemical Canada Ltd. (unreported) Board of Inquiry (Mercer), September 18, 1996, at page 88.

I also recognize that intention to discriminate is irrelevant and that intention need not be proved, nor does the Complainant have to provide motive to discriminate, as this has been put to rest by the Ontario Court of Appeal in *The Board of Education for the City of Toronto v. Muhammad*

Saleen Quereshi and the O.H.R.C. (1991) 14 C.H.R.R. D/243 (Ont. C.A.), at page 249, para. 49.

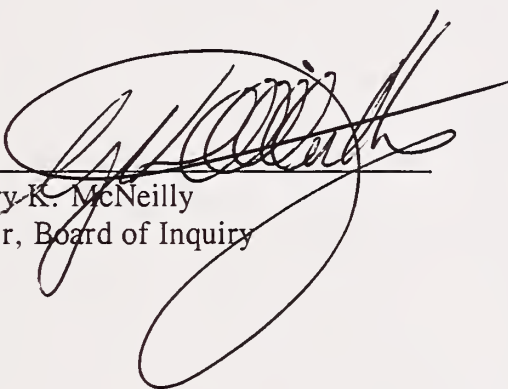
With regard to the Complainant's allegations of systemic discrimination, I find for a fact that the Durham Board employed informal guidelines for promotion, which were not applied consistently to all Vice-Principals or teachers. I also find that officials of the Durham Board subjectively decided which teacher would be approved to take the Principal's courses; they had no clear written or circulated practices or policies dealing with matters such as rotation and promotion, establishment of release time, or policies to ensure that all teachers or Vice-Principals were treated fairly and without regard to irrelevant personal characteristics such as race and ethnic background.

Finally, I find that in the last 19 years of his employment the Complainant was personally discriminated against because of the Durham Board's refusal to approve his taking the Principal's courses, and giving him an "explanation" that only those with an expectation of succeeding were being approved. Also, the actions of two senior staff members of the Durham Board, who directly challenged the Complainant about his ambitions to be a Principal at a "white" school, and the other who showed his back to the Complainant throughout the interview, amount to direct discrimination. The various attempts to thwart the Complainant through offers of half the release time available to his white counterparts at the same school amounts to direct discrimination. The unfavourable proposals of release time appeared to have been an effective tool to stifle the ambitions of a dedicated qualified teacher who because of his race, was unwelcome in the upper echelons of the Durham School Board. Throughout this hearing, no justification or reasonable explanation was put forward by the Durham Board for these occurrences that breach sections 5(1) and 9 of the *Code*.

While I have found the Corporate Respondent liable for the acts and omissions of its officials, I find that the evidence does not clearly support a similar finding against Mr. Don Peel and so I dismiss the complaint against him.

I agreed to bifurcate the hearing and have restricted my findings to liability at this stage. I retain jurisdiction with respect to remedy and request that the parties contact the Board within 45 days of receipt of this decision to proceed with the hearing, if they are unable to mutually agree on an amount for damages.

Dated at Toronto this 28th day of August, 1998.



Gerry K. McNeilly
Chair, Board of Inquiry

